# ORGANIZATION AND PROCEDURE OF THE COURTS [1]

WILLIAM L. RANSOM

Justice of the City Court of the City of New York

I HAVE had before me for several days the manuscript of Mr. Jessup's suggestions and the report of the committee of the Phi Delta Phi, and have had opportunity to examine them with some care. In many respects they parallel recommendations which the bar associations are likewise urging, but you have under consideration here the coördinated plan proposed by Mr. Jessup, and I shall shape my discussion accordingly. I am sure that the bench and the bar of the whole state will recognize their debt to Mr. Jessup for his labors in behalf of a more efficient judicial system, and also their debt to the committee of the Phi Delta Phi for the concrete and tangible form in which its recommendations are presented. In no respect will this conference of the Academy perform a greater public service than in thus placing emphasis, now and hereafter, upon the importance of concrete formulation of every suggestion which anyone has to make along the lines of constitutional change, to the end that the same may be thought out and fought out before the convention itself comes together in Albany next April. I hope that the Academy and its program committee will strongly recommend, if not absolutely insist, that I and every other speaker who utilizes this platform to urge any change in the existing constitution of the state, shall follow Mr. Jessup's example and annex to the printed version of his remarks, in at least some tentative form, "*the black-and-white*" of exactly what he proposes.

No length of experience on the bench or at the bar is available to give weight to anything I may say in discussion of the

[1] Discussion at the meeting of the Academy of Political Science, November 19, 1914.

details of Mr. Jessup's suggestions, but I come to you from a tribunal of which each member conducts probably more jury trials of civil cases each month and each year than does any justice of any other court in America, and I can at least indicate to you how some of these things appeal to me, from the viewpoint of that daily contact. It seems to me that Mr. Jessup's proposals, and the parallel proposals of the Phi Delta Phi and some of the bar associations, have the merit that they spring, not from preconceived abstractions or pre-disposition to change, but rather from the actualities, "the grass roots," of the hard, day-by-day experience of the bench and bar. Considered as a whole and with due allowance for some difference as to details, they represent only conservative and well-demonstrated changes in either the substance or the phraseology of the existing constitutional provisions; and it seems to me to be the first axiom of any revision of the judiciary article, that there should be no change in its well-litigated wording or its well-tried substantive provisions, except on the basis of what has been established by convincing experience and what offers reasonable certainty of improvement in that which we already have. You may or may not believe, as I do, that other and further changes in the judiciary article, over and above what Mr. Jessup has discussed, should and will receive careful consideration at the hands of the constitutional convention; but this I do not believe can be gainsaid, that if the convention should bring about no other thing than the writing into our fundamental law of substantially the provisions formulated by the Phi Delta Phi, the work of the convention would nevertheless be worth to the state a thousand times more than the convention will cost, and New York would be placed actually in the lead of all the states in the efficiency and suitableness of her machinery for the administration of justice. Improved in detail these recommendations can, and doubtless will be; but they represent an acceptable minimum of positive advance.

Doubtless you all were impressed by what Mr. Jessup said regarding the relative inefficiency of our judicial system as a mechanism for securing the results to which it is consecrated. I do not suppose that an alert business man or "business law-

yer" ever comes from his well-organized, perfectly coördinated office into a court in this city without feeling somehow, consciously or unconsciously, that the court has failed to keep pace with the life of the community which surges outside its walls, and that somehow the organization, procedure, and administrative routine of the court are still of an era which the community outside has necessarily superseded, in order to hold its own in the commercial competition of the times. The tribunal to which, as a last resort, the business man submits his controversies with his fellows, is practically the only institution of private or public activity which, in its administrative and procedural methods, still lumbers on in the same old way of fifty years ago. Right here, I am inclined to believe, will be found the responsibility for a large part of that variance to which Mr. Jessup has referred, between justice as administered in a court and justice as innately conceived by the average man of intelligence and good conscience. I do not find men unwilling to have their disputes and controversies determined and their rights of property adjudicated according to the principles of our substantive law. It is not a desire to avoid the application of rules of law which drives business men out of our courts, into reluctant settlement of controversies which should be litigated or into the submission of them to arbitration tribunals established by private agencies. Litigants do not submit themselves before arbitration committees of commercial organizations in order to secure the *arbitrium boni viri* or to subject their property and rights to individual judgment as substitute for long-established rules of the substantive law. The aversion of the business man is to the procedural and administrative side of our legal machinery. He believes in and needs the administration of justice according to law; the safety of his transactions requires certainty and rule as the basis of individual and property rights. Popular dissatisfaction with the law, as I find it, is based not so much upon the variance between justice according to the substantive law and justice according to the *arbitrium boni viri,* as upon the variance between the justice which would result from a fair, prompt determination of controversies according to substantive legal

principles and the justice which does result from the existing procedural mechanism of our courts. Business men go to arbitration to avoid legal *procedure* and not legal *principles*. I wish I had time to comment further on this phase of Mr. Jessup's remarks, but I have not, except to say that to tune up and speed up our judicial mechanism, to cut out the delay and the "lost motion," to organize our courts along lines which take cognizance of twentieth-century experience and expedients, and to bring to the aid of the courts those direct and simple administrative aids which modern progress has made available in every field of activity, is, to my mind, one of the paramount tasks of to-day. As Mr. Taft said in Chicago in 1909: "Of all the questions that are before the American people, I regard no one as more important than this: to wit, the improvement of the administration of justice."

Much of this improvement will come, and is coming, not from changes in constitutions or even in codes or statutes, but rather from changed point of view and added efforts on the part of both judges and lawyers. Some of these matters we have lately been at work upon in New York county, and in my own court, at least, I know that it is not too much to say that administrative changes made by the justices themselves have increased by not less than twenty-five per cent the absolute efficiency of the court in the dispatch of business; and in the enhanced suitableness of the court as a forum for meeting the public needs to which it is designed to minister, the relative increase has been far greater. For example, within the present month we have put in force a separate commercial calendar, on which actions on commercial paper or for goods sold and delivered, and the like, are reached for trial within three or four weeks, instead of a year or more, after suit is started. In actions of this character, delay of determination is, to an unusual degree, likely to amount to a denial of justice, and by administrative changes in other parts of the court, it has been possible to give this preference to commercial causes without appreciably prolonging the time within which other classes of actions may be reached for trial. When one sees at first hand the things which can and some day will be done, by

way of "taking the slack" out of the existing judicial mechanism, utilizing the waste and avoiding the indirection therein, organic change seems far less important and there comes a powerful disposition to concentrate energies on the task at hand. Nevertheless, the people of the state have chosen a constitutional convention, and have elected to it men peculiarly adapted to deal intelligently and remedially with the existing judiciary article. The convention will, I take it, be especially inclined to give weight to the recommendations of the bar association and similar organizations, and it will be both surprising and disappointing if the labors of the convention do not give us a substantially improved judicial establishment, one which will lend itself even more suitably to the forward movement along the lines to which I have referred.

But I must hurry on. Perhaps the best thing I can do, in the few minutes remaining, is to refer to one or two other things which seem to deserve consideration by the convention. These conveniently classify themselves under three heads:

(1) Improvement in the method of selecting judges.

(2) Provision for adequate representation and presentation of the public interest in judicial consideration of the constitutionality of statutes.

(3) Aids to the development of a more simple, direct and suitable judicial procedure and the prompt determination of controversies according to established legal principles.

Time does not permit me to do more than refer to these topics.

### *Improvement in the Method of Selecting Judges*

Ought not the new constitution to bring about at least some substantial improvement in the methods of nominating and electing judges? Are we not ready to make some substantial advance in this respect? Ought not the new constitution at least to make mandatory the providing of a separate ballot for the election of judges, such ballot to bear no party names or emblems and no numbers or other designations of candidates? I grant that for executive and legislative officers, it is

desirable to continue, even under the Massachusetts form of ballot, the presence of the party names and emblems on the ballot, because there is a Republican way or a Democratic way or a Progressive way of administering those offices, and it may well be urged that a voter is entitled, and should be enabled, if he so desires, to vote for officials who will administer those policy-determining offices from a party point of view, even though the voter knows neither the names nor the qualifications of the candidates. In the case of judges, should we longer permit that method of choice? Should we suggest, by our form of ballot, that there is a partisan way of administering a judicial office or that party membership should be a basis of election thereto? Ought not the new constitution to put a premium on intelligence and discrimination in the choice of judges, and separate their election distinctively from the category of offices which are or may be voted for in a blind and purely partisan manner? The constitutional convention will doubtless consider the subject of requiring non-partisan judicial primaries, in complete substitution for the present system of party nominations of candidates for judicial office; but if it be deemed that the time has not yet come to stipulate in the organic law for a purely non-partisan mode of nomination as well as election, the requirement of a separate judicial ballot, bearing no party names, emblems, or numbers, would seem to be a step for which public sentiment in the state is fully prepared.[1] The new constitution ought to help along the cause of greater care and intelligence in the choice of judges, at least to the extent of making it impossible for an elector to participate in the election of judges without at least ascertaining the

[1] The following is a tentative suggestion of the possible phrasing of an amendment to the existing constitution to accomplish the above-indicated purpose: Amend Article II, Section 5 thereof, entitled, "Manner of Voting," by adding at the end of Section 5 the following new matter: "At any election at which a judge or justice of a court of record is to be chosen by the electors, a separate ballot therefor shall be provided, which ballot shall contain the names of all the persons nominated for any such judgeship or justiceship to be filled at such election, but shall not contain the name or emblem of any political party or other nominator, or any number or other designation in connection with the name of any candidate appearing thereon."

names of the men for whom he wishes to vote! In connection with this same subject of selection of judges, another interesting suggestion has been made, which is regarded by some as combining the advantages of both the system of popular election and the system of executive selection. It is that the executive be given the power, whenever any judicial office is to be filled at an election, to make seasonably a selection or nomination of a candidate for the place, such candidate to be, by virtue of such executive designation, entered as a competitor in each of the party primaries and at the polls, subject to the right of the person so designated to decline to be a contestant in the primaries of any particular party or, in his later discretion, at the polls. If upon full consideration, this plan seems to offer a desirable modification of the elective system, it will be found in accord with our fundamental political theory of giving to the executive large powers for the proper direction of government, with full opportunity for the people to deal effectively with the unwise exercise of that power. Personally, I have not yet reached a conclusion whether such a combination of the appointive and elective system is desirable.

Closely related to the selection of judges is the question of their tenure, accountability and discipline. In every state constitutional convention in recent years, this has been a subject most vigorously debated, not always with fortunate outcome. Strangely and most illogically, the emphasis has commonly been on improving, or at least changing, the modes of removal, rather than on improving the mode of selection. Most illogically, the efforts of supposedly "progressive" elements in such gatherings have been centered on forcing through more facile means of getting rid of thoroughly objectionable judges after election, rather than means of preventing the election to the bench of men at all objectionable. Likewise illogically, it seems to me, the efforts of those opposing innovation in judicial tenure have been too often confined to mere opposition; they have failed to recognize that the way to obviate any need for easier ways of getting rid of objectionable judges is to adopt means ensuring a more careful and discriminating popular choice in the first instance. May we not hope that in our New

York convention the emphasis will be placed on prevention rather than on subsequent surgical relief from the consequences of poor choice?

Over and above this, however, it seems to me that those of us who oppose, as I have always opposed, the adoption of the "recall of judges" owe it to ourselves and to our deep convictions on the subject to offer constructive methods for dealing with the conditions which give rise to the demand for the expedient which we deem unsuitable and dangerous. There *are* such conditions and there *is* such a demand. I doubt whether anyone could read the report of the State Bar Association Committee (1913) on the Causes Underlying the Dissatisfaction with Our Judicial System, without realizing that there *is* dissatisfaction and prevalent criticism, on the part of great numbers of our people, and that this dissatisfaction and criticism is based, in large part, upon specific instances which are believed to show judicial misconduct or perversion of justice, but which have, with rare exceptions, never been the subject of any inquiry or report by any judicial or other tribunal. The average man, when he is the victim of what he believes to be judicial impropriety or when he learns of a judicial act which he believes has inflicted injustice on a friend or neighbor, is inwardly exasperated and embittered because of the lack of remedy, the lack of forum to which to complain, the lack of tribunal which can give him a hearing, which will let him bring his grievance into the light, and will take pains to develop the facts on the issue whether his grievance is well-founded. Ought not there to be in this state a permanent tribunal, before which complaint regarding the conduct of any judicial officer might be made at any time by any lawyer or by any citizen, and ought not such a tribunal to have plenary power to investigate and report concerning any such complaint, power to censure and perhaps to discipline, power also to institute before the legislature impeachment or removal proceedings as to any judge, and power to institute before the appellate division proceedings for the disbarment or discipline of any lawyers involved in any matters as to which complaint was laid before such tribunal? Would it not be for the best interests of judges, lawyers and litigants alike,

that there should be such a tribunal always open to receive and promptly investigate complaints concerning our judicial system, rather than that such grievances, real or fancied, should be left to rankle long in the minds of those concerned, embittering them with our free institutions, or that these self-magnifying grievances should be left to form the subject-matter of inflammatory and unfair appeals to an electorate which cannot possibly investigate the facts concerning them, at the time when the judicial officer in question goes before the people for re-election on his whole record? Would it not be better to have the charge or suspicion threshed out at the time it arose, and the facts judicially ascertained? That is why I suggest that the convention consider the adoption of some such plan as was worked out in the Ohio convention, whereby, in addition to the removal and impeachment provisions (which Mr. Jessup's draft strengthens in important particulars), constitutional sanction might be given for the creation and powers of such a tribunal. The make-up and mode of selection of so august a body would not necessarily be fixed in and by the constitution itself; authority for its creation by the legislature would be sufficient.

Would not the results be most wholesome? Would they not tend to strenghten our whole juridical system in the public confidence? The best thing you can do for and with a man with a grievance is to let him *tell* it, "out loud," as we used to say in school, and let him try to *prove* it before his fellow men. A grievance regarding the fairness or integrity of a judicial officer is the last of all grievances that a democracy can permit to remain "un-aired" and unadjudicated. In this connection, I may say that I think the effect upon the relations between the bench and bar would be most advantageous and salutary. There is no reason why men should not have opportunity to tell what they honestly think about judges and courts. The frank recognition of such a right will be a good thing for both lawyers and judges. I have great regard for the dignified and mutually deferential relation which should, and usually does, obtain between court and practitioner; I look on it as an indispensable aid in the impressive administration of justice; but I would rather see that dignity and deference builded on respect rather

than primarily on suppression and fear of "contempt" or disbarment proceedings. I should dislike to think that the accident of an election which transferred me from an administrative to a judicial office could deprive members of the bar, who came before me then and come before me now, of their right to comment freely and complain vigorously, in my presence or elsewhere, concerning anything which they might honestly think was an abuse, on my part, of official propriety and discretion. It would greatly improve the administration of justice if a lawyer could safely present his client's right, and his own and his client's sense of grievance, to some such tribunal as I have indicated, even though that right or that sense of grievance arose from some abuse of power or breach of propriety on the part of a judicial officer. A lawyer, litigant, or ordinary citizen, who conscientiously believes that a judge has been guilty of improper conduct, and is willing to take the responsibility of complaining about it and doing what he can to prove it, should be afforded a fair opportunity and a suitable, at-hand tribunal for so doing. And when that tribunal has been brought into being, there should be coupled with its creation the further proviso, so well phrased by Mr. Charles A. Boston in a remarkable address before the State Bar Association last year, that "no court in this state shall have hereafter any power to disbar or discipline, in his official relation, any lawyer, for making any charge against the manner of administering justice in the court, until the lawyer has had an opportunity to demonstrate the truth of his charges before such a tribunal, and not then, unless this tribunal shall first certify that the lawyer acted without probable cause."

### *Representation of the Public Interest in Judicial Consideration of the Constitutionality of Statutes*

Ought not the coming convention to give careful consideration to ways and means of ensuring that in judicial consideration of the constitutionality of statutes, there shall be not only adequate representation of the public point of view in the suit in which the question of constitutionality is raised, but also adequate presentation of the public interests involved? Under

our form of government, we are committed to the determination of far-reaching questions of constitutional power and governmental policy in inconspicuous suits between ordinary private litigants—oftentimes in suits brought into being by interests seeking to obtain thereby a decision adverse to the validity of the statute and therefore controlling the conduct of both sides of the litigation to that end. The conference of hostile interests to frame a "test case" is a familiar preliminary to an acute legal onslaught on the constitutionality of a legislative enactment. Are we willing to leave our constitutional questions to an arbitrament in which counsel on both sides represent the hostile private interests and only the court is the possible champion of the public rights and the public interests? Might it not well be provided that no appellate court should hear or determine any appeal in which such a constitutional question was involved, except upon proof that the appellant therein had duly notified the attorney general of the state that such a question was involved in the appeal then pending and on proof that copies of the appeal papers and briefs had been duly served on the attorney general, who should have the right to intervene and be heard upon the argument of any such appeal?[1] Or might a similar result be more satisfactorily secured by providing that the state of New York is a necessary party defendant in any action in which either party asserts the unconstitutionality of a state statute?[2]

[1] This result could be brought about through the insertion, as a new section or at the end of a suitable existing section, of phraseology somewhat as follows: "In the trial or hearing of any action or proceeding in any court, in which the invalidity of a statute of this state is asserted by any party thereto, the attorney-general shall have the right to intervene at any time and be heard upon the question of the validity of such statute. The appellate division or the court of appeals shall not hereafter hear or determine any appeal in which the invalidity of any such statute is asserted, except upon proof that the appellant in such court had seasonably notified the attorney-general of the pendency of such appeal and had duly served him with all papers on such appeal, as though the state of New York were a party to such action or proceeding."

[2] A method of giving formulation to this plan would be to add to the judiciary article a new section, to read somewhat as follows: "In any civil action in which a party thereto asserts the invalidity, under this constitution, of a statute of this state, the state of New York shall be a necessary party defend-

In dealing with this general subject of the relation of the courts to legislation, the convention may perhaps also give consideration to the advisability of adopting, in this state, some provision similar to that contained in the present constitution of the state of Ohio, to the effect that the concurrence of more than a majority of the judges of the court of appeals sitting in a particular case shall be necessary to a determination that a statute involved therein is unconstitutional.[1] In Ohio, the concurrence of all but one of the members of the highest court of appeal is required, except in cases where the court of intermediate appeal has itself held the statute unconstitutional.

### *Aids to the Simplification of Procedure and the Prompt Determination of Controversies*

Finally, what constitutional aid may be given to the simplification of legal procedure, the avoidance of jurisdictional technicalities, the clarification of litigated issues, and the prompt disposition of all phases of a controversy in a single trial? I have not discussed, and shall not discuss, in these remarks, the details of what Mr. Jessup urges as to the consolidation of courts. I feel that what he urges is sound in principle, but I am not yet sure that in details he presents altogether the wisest plan. For example, I am not certain as to the wisdom of the abolition of the surrogates' courts as county tribunals in upstate New York. In this county, it makes perhaps no fundamental difference whether the function of the existing surrogates' courts is performed by those courts or by a probate division of the supreme court for New York county; but I am

ant; but no such action shall be deemed a suit against the state, within the meaning of this constitution, and in no such action shall any award of costs or any other money or thing be made for or against the state as such party defendant."

[1] A formulation of such a provision would be the following, to be added to an existing section of the judiciary article or to constitute a new section thereof: "Except in affirmance of a decision of the appellate division of the supreme court that a statute of the state is invalid under and by reason of the provisions of this constitution, the concurrent action of more than a majority of the judges of the court of appeals hearing an appeal therein shall be necessary to a determination by the court of appeals that such a statute is invalid as aforesaid."

not clear that the electors of upstate counties will wish to see the intimate and almost sacred functions of the surrogates' courts taken away from officials chosen by them in and for their particular county and turned over to supreme court justices chosen by a judicial district of many counties, some of which are rarely, if ever, represented in the supreme court for the district. Again, in the upstate counties, the county court is an invaluable local tribunal, which no revisers would seriously think of tearing down. It meets the local need most suitably. But that is not by any means conclusive proof that the establishment of a county court in New York county would be the best means of dealing with our metropolitan situation. Neighborhood or district courts are required for the handling of the smaller causes, and what is needed, I am inclined to believe, is not the transfer of those controversies to any tribunal which will follow, even more closely than the present municipal courts, the formalities and technicalities of the procedure in courts where trials are conducted by able counsel. What is preferable, it seems to me, is that the municipal courts shall be made, to an even greater extent than now, tribunals of arbitration, conciliation and adjustment, rather than of formal trial. What is needed is to free these district or neighborhood courts of the incubus of the code of civil procedure and make them even more fully a forum in which substantial justice, common sense and fair dealing according to well-settled principles of the substantive law, are administered through methods of inquiry which more nearly resemble the simple, direct, exact business methods of the time than the technical procedure and involved evidentiary rules of the courts of law. If the municipal courts were made a tribunal of that character, it might then be practicable to vest in a court of general jurisdiction the trial of all cases in which a formal trial at law was to be had, irrespective of the amount involved. When every phase of a case, every phase of a subject-matter of controversy, can be determined in one court, and can receive the continuous attention of but one judge rather than the casual animadversion of many, we shall have made progress in bringing the machinery of the law abreast of present-day standards of effi-

ciency and directness; and I do not believe that we can have an economical, expeditious and common-sense system until we have eliminated from justice as administered in the courts the jurisdictional disputes and technicalities which are the by-product of the present illogical, awkward and expensive division between uncoördinated tribunals.

What constitutional aid may be given to the summary and scientific disposition of all procedural and preliminary applications? I am of the opinion that the recommendation of Mr. Jessup's committee for supreme court commissioners or masters is the soundest that has been made, and that it would work a really monumental reform in the administration of justice. What is needed is that up to the time a civil action comes on for trial, it should have the continuous oversight of one trained judicial mind; that there should be one judge or one master who would hear all preliminary and procedural application in the case, and who would have both the power and the duty to see to it that the pleadings are in proper shape to present the issues, that the issues are narrowed and clarified, that all facts not really in dispute are reduced to written concessions of the parties for the purposes of the trial, that sham and fictitious issues are eliminated, that bills of particulars are furnished and proper examinations before trial are conducted, and that the controversy is made ready for prompt and expeditious trial on the merits. The evils of having procedural applications in the same case submitted successively to perhaps a dozen judges are the bane of the daily life of the judge who has finally to try the case, and are a prolific source of trouble on appeal. Rarely does a case come before the trial judge in which he does not painfully realize how much the controversy really entitled to be litigated might have been simplified and shortened, had the cause had some such preliminary oversight as I have mentioned. In addition, every lawyer will realize that any such oversight would mean that many actions would never survive this oversight and never would reach the day calendar for trial at all, but would be settled or disposed of in the preliminary stages. How many baseless causes of action and how many fraudulent and unfounded defenses would go down in

such a first-hand oversight. Calendar congestion would be greatly reduced, through shortening the time required for the trial of cases and lessening the number of cases actually tried. The most practicable plan I have yet seen for bringing about the results we all have in mind along these lines is the system of "commissioners" or "masters" for which the Phi Delta Phi report proposes constitutional sanction, and I hope for the unabridged adoption of this portion of the report.

Ought not the new constitution definitely to give the weight of its great authority and influence to the prompt determination of causes on their substantial merits, without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties? Ought not this to be made the constitutional ideal of our judicial system? May not the new constitution give a definite impetus, a far-reaching fundamental sanction, to a conception of law which looks on rules of procedure as instruments of justice, rather than ends in themselves, and looks beyond the forms to the substance?[1] Who can estimate the effect of writing so salutary a provision into our organic law? You may say that a similar provision could be passed by the legislature, without making it a part of the constitution, but I believe that a provision which relates so closely to the fundamental spirit of our judicial system, deserves a place in the constitution and ought to have back of it the emphasis which such a place could alone give it. In this same connection, might not the appellate courts well be given express constitu-

[1] A new section of the judiciary article is suggested, to read somewhat as follows: "No judgment shall be set aside or reversed or a new trial granted by any court in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error or omission as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error or omission complained of has injuriously affected the substantial rights of the parties and that some substantial wrong or miscarriage was thereby occasioned at the trial."—[NOTE: This provision closely follows the phraseology of the act binding on the English appellate courts and also of the bill introduced by Senator Root and repeatedly endorsed by the American Bar Association for the government of appeals in the federal courts.]

tional sanction for a broad power as to the entry of what they deem to be the proper judgment in the case before them, instead of merely remanding for a new trial if unable to affirm the judgment below?[1] That is to say, if the appellate court does not find that there was rejected or omitted from the record of the trial below any evidence which might affect the proper disposition of the case, ought not the appellate court to have a considerable power to render the judgment which it thinks ought to be rendered, in view of all the testimony in the case, instead of sending the case back to a re-trial, from which it will probably come again to the appellate tribunal?[2] Injustice might in some cases result from the exercise of such a power by the appellate court, just as injustice results in other cases from the remanding for a re-trial. It is difficult to tell which rule and practice would ordinarily achieve a larger degree of substantial justice, but may not this discretion well be given to

[1] This should doubtless be made the subject of a new section of the judiciary article, somewhat as follows: "Upon any appeal from a judgment or order, the appellate division, or the court of appeals in any case in which its review is not limited to questions of law, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and shall thereupon render judgment of affirmance, judgment of reversal, and final judgment upon the right of any or all the parties, or judgment of modification thereon, according to law, except where it may be necessary or advisable to grant a new trial or hearing, in which event a new trial or hearing may be granted."

[2] Reversals for omissions of evidence and the like might be still further reduced in number by the adoption of a constitutional provision along the following lines, paralleling some of the provisions of a statute enacted in Massachusetts by chapter 716 of the Laws of 1913 of that state, but for which constitutional sanction would probably be required in New York, in view of the construction placed on existing provisions of our state constitution: "The appellate division and the court of appeals, upon the hearing of any appeal, shall have all the powers of amendment of the trial court; and whenever exceptions have been taken to the exclusion of evidence, or where the alleged error arises from the omission at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury and without substantial injustice to either party, the appellate court shall have power, in its discretion, to cause such further testimony to be taken as it deems necessary, either by oral examination in court, by reference, by production of a document or record, by affidavit, or by deposition, and the court shall have the power to render any judgment and to make any order that ought to have been made upon the whole case."

the appellate court itself? Looking at the matter in a large way and in the long run, would not the efficiency of our judicial system be promoted through the wise exercise of such a power, better than through a more general resort to the expensive and dilatory practice of re-trials and re-appeals? The legislature in 1912 enacted section 1317 of the code of civil procedure. This section represents a valuable step in the direction of the ends sought by the amendment first referred to under this heading (see note 1 on the preceding page), and the court of appeals has very recently, in the case of Lamport *v.* Smedley, decided November 10, 1914, given a broad and wholesome construction to the powers conferred by the new section. Embodiment in the fundamental law of the supplemental provisions which I have indicated, would tend still further, and far more decisively, in the same salutary direction. I believe that the appellate courts ought to be encouraged and fortified in entering the final judgment they deem proper, when unable to affirm the judgment below, and that as a rule such a power will be exercised in a way more consonant with substantial justice than could be worked out through clogging court calendars with protracted re-trials and re-appeals. In one "grist" of appellate division decisions not long ago, it was estimated that enough cases were sent back for re-trial to keep the trial parts of the supreme court busy for a week. On the whole, I think the litigants would be likely to get as satisfactory and just a determination from the appellate tribunal as from a re-trial, and to get it much sooner, with less clogging of the way of other litigation coming on for its day in court. The whole subject at least deserves the thoughtful consideration of the convention.

You may ask: "Why should even the brief provisions you have tentatively phrased be put into the constitution? Why may not all these matters be left to form the subject-matter of statutes?" The answer is at least three-fold: In the first place, for all except one or possibly two of the suggestions, constitutional action is probably requisite to their valid adoption in this state. Decisions interpreting existing constitutional provisions raise serious doubts whether these things

could be brought about by statutes. In the second place, these suggestions relate to and would vitally affect the fundamental spirit of our laws and our judicial system. For example, certain of them propose a transformation of our appellate tribunals from courts of error to courts of appeal—tribunals in which error would be corrected and not merely detected, tribunals in which further delay and expense would not be the inevitable penalty of the appellant's success or the discovery of more or less consequential errors below, tribunals with an affirmative responsibility for determining the right result rather than merely a negative responsibility for saying whether the court below has permitted a wrong result. Surely so fundamental a change in the spirit and theory of our judicial system should have its basis in constitutional provisions and have behind it constitutional sanction. In the third place, if the results to be secured are as important as they seem to be, we can well afford the few lines of printed matter requisite for their expression in the fundamental law. Better a few more lines and a few short sections there, than the continuance of the delay and technicality and denial of justice which recurs through their absence. If we can shorten the time, lessen the expense, and simplify the machinery, for the trial of controversies which come into our courts, and can attain more closely to that certainty and fairness in the application of rules of law which is the ideal of our jurisprudence, we can afford the space required to give a constitutional basis for it, and thus enable the submission to the people of a judiciary article which will be the most notable feature of the new constitution.

ROBERT LUDLOW FOWLER

Surrogate of the County of New York

When I had the honor to accept the invitation of the Academy of Political Science to discuss Mr. Jessup's paper I stated that I could make no preparation and should have to trust to such observations as occurred to me without premeditation. Mr. Jessup is a learned specialist in a department of

law in which I take great interest, and I naturally desired to be present on this occasion.

If I understand the purport of Mr. Jessup's paper, it unfolds three propositions. The first, and perhaps the most important in the abstract, is that the justice commonly administered in the courts of our country, and I presume in the courts of our own state, is not at one with "justice;" in other words, that the law which we administer is not consistent with that abstraction which is known as "justice." I had always supposed that law was justice and that justice was law, and that there could be no great distinction between law and justice; at least, I labored under the vain hope that in the court in which I sit the law I administer is justice and the justice I administer is law. It is a very old philosophical discussion, the difference between justice and law.

The common law is a very great system. It is the tradition of the dead of our race and kind. It is the legacy of all the men of the past. It is the crystallized wisdom of the ages which have preceded us. If that law and that experience were not consistent with justice, it would be a very singular thing. One of the greatest names in the philosophy of the common law, undoubtedly, is that of Thomas Hobbes, who investigated the question and came to the conclusion that there could be no definition of "justice" except "law."

My learned and very esteemed friend, Mr. Jessup, has suggested that perhaps law could be found in what he termed the *arbitrium boni viri*; that is, "in the opinion of a good man;" but that, you will see in an instant, is pure idealism. Law cannot exist in the bosom of any good man. Law is a concrete thing; it is a force; it is the force of government, and it is not the *arbitrium boni viri*; so much for that.

It is rather the fashion at this day—and we live in a singular day of criticism and change—to criticize the law which is administered by the courts of this country; but let me say to you that the courts are the very bulwark of the country. They are the one persistent force which gives order to our society; more respectable than any other branch of the government, more permanent, more conservative than the executive or the legis-

lative branch of the government are the courts of justice. I think there can be no doubt that it would be the verdict of the citizenship of this country, for example, that the contribution of the Supreme Court of the United States to good government, to permanency of institutions and to our general prosperity, exceeds, or certainly equals, that of any other branch of the public service.

The second idea which my learned friend unfolds is, that the improvement in the workings of the law and of the judiciary in this state will be fostered by consolidation of the various courts of this community. No doubt some of the courts may be consolidated with some advantage. My off-hand suggestion would be that the small courts must continue to exist. The small courts are the "small change" of society; just as small change is necessary for small transactions, small courts are necessary for small litigations and small suitors. Whether or not it would be good policy to consolidate the small courts with what we regard as the more important courts of the community I think may be open to some question. It might prove a leveling down instead of a leveling up, and after all, the object of courts is efficiency and dignity in the administration of justice. I think we may safely leave those considerations to the action of the constitutional convention as it has been chosen.

The next point developed in the paper of my friend is that it is desirable to cut off all sorts of technicalities from our judicial proceedings. Up to a certain point that is undoubtedly a valuable suggestion; but we belong, of course, to a technical profession, and the first point for the consideration of judges and lawyers is accuracy of judicial proceedings. It is not a waste to spend time in ascertaining what the real point of a litigation is.

I think part of the embarrassment, if there be embarrassment, in the working of our present system, has been occasioned by the excess of legislation affecting procedure, and particularly affecting the code which was originally presented for the action of the legislature about 1847. This was a small and admir-

ably drafted instrument. Amendments and alterations of that instrument by the legislature should be stopped.

The procedure in courts of justice may safely be left to the judges; perhaps somewhat after the plan adopted in England. It is not always the case, however, that plans adopted in England are well adapted to our system. If it is possible for the constitutional convention to take up the question of procedure, there is no doubt that good work may be done in simplifying the procedure in the courts of justice of this state.